UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LOUIS C. WHITE, Petitioner-Appellant, vs. LAWRENCE E. WILSON, Warden, San Quentin Prison, Tamal, California, Respondent-Appellee.	)	No. 22210

BRIEF OF APPELLEE

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

6000 State Building
San Francisco, California 94102
Telephone: 557-2847

Attorneys for Appellee

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JURISDICTION

The jurisdiction of this Court to entertain this appeal from the United States District Court's denial of appellant's petition for writ of habeas corpus is conferred by Title 28, United States Code, section 2253, which makes a final order in a habeas corpus proceeding reviewable in the Court of Appeals when a certificate of probable cause has issued.

STATEMENT OF THE CASE

A. Proceedings in the State Court

Appellant, Louis C. White, was convicted after trial in the Superior Court of the State of California for the County of Alameda of assault with a deadly weapon. On February 16, 1962, he was sentenced to state prison for the term prescribed by law.

On Friday, November 3, 1961, appellant was arrested and charged with attempting to murder his wife the previous

Tuesday (October 31, 1961). He was taken before a magistrate and arraigned the following Monday (November 6, 1961). Following a preliminary hearing in the municipal court appellant was held to answer on an information charging him with assault with intent to commit murder and assault with a deadly weapon. He was arraigned on this information December 14, 1961, and by consent the cause was continued to January 22, 1962, for trial.

An appeal from the judgment of conviction was taken to the Court of Appeal for the First Appellate District. On January 29, 1963, Division Three of that court affirmed the judgment in an opinion which is reported at 212 Cal. App.2d 464.

B. Proceedings in Federal Court

On January 9, 1967, appellant filed a petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, Case No. 46283. An order to show cause was issued and appellee, respondent below, filed a return to that order on February 14, 1967. Appellant filed a traverse to appellee's return on February 24, 1967.

On April 26, 1967, the District Court denied the petition for writ of habeas corpus, discharged the order to show cause, and dismissed the proceedings.

On August 25, 1967, a certificate of probable cause was issued by the Honorable Alfonzo J. Zirpoli, Judge of the United States District Court for the Northern District of

California, Southern Division. On September 11, 1967, a notice of appeal was filed.

ARGUMENT

I.

IT WAS WITHIN THE DISTRICT COURT'S DISCRETION TO DENY APPELLANT'S APPLICATION FOR A WRIT OF HABEAS CORPUS WITHOUT REQUIRING HIS PERSONAL APPEARANCE.

The mere fact that the district court has the power to order a prisoner produced in a habeas corpus proceeding does not mean that he should be automatically produced in every such proceeding. United States v. Hayman, 342 U.S. 205 (1952). Since the merits of appellant's application for a writ of habeas corpus could be determined on the record before the court, neither a hearing nor the presence of appellant was required. Yeaman v. United States, 326 F.2d 293 (9th Cir. 1963).

II.

APPELLANT'S ALLEGATION THAT COERCED AND INCRIMINATORY STATEMENTS WERE USED AGAINST HIM WAS INSUFFICIENT TO WARRANT RELIEF.

Appellant alleged that he was interrogated by police officers using coercive methods after he had requested the presence of counsel.

The conviction appellant is attacking here resulted from a trial which occurred in 1962, long before the effective date of the prospective application of the rules announced in Escobedo v. Illinois, 378 U.S. 478 (1964), and

Miranda v. Arizona, 384 U.S. 436 (1966). See Johnson v. New Jersey, 384 U.S. 719 (1966). Furthermore, the record of the trial, which was lodged with the district court, indicates that no statements were introduced into evidence against appellant. The sole reference to any statement given by appellant was elicited from Inspector Anderson by defense counsel on cross-examination (RT 103).[1] After ascertaining that the Inspector had taken a statement, counsel dropped the issue.

III.

APPELLANT WAS NOT DENIED HIS CONSTITUTIONAL RIGHT TO A SPEEDY TRIAL.

The crime for which appellant was convicted was committed on Tuesday, October 31, 1961. Appellant was arrested the following Friday, November 3, 1961. He was taken before a magistrate on Monday, November 6, 1961, at which time bail was set in the amount of $3,150.00. This was later increased to $8,150.00 upon motion of the district attorney due to petitioner's previous conviction of manslaughter. A preliminary hearing was held in this matter and appellant was held to answer in the superior court where he was arraigned on December 14, 1961. At that time, with the consent of appellant's counsel and the prosecution, the case was continued to January 22, 1962, when trial commenced. Appellee submits that the record in this case

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1. "RT" refers to Reporter's Transcript of the proceedings at trial heretofore lodged with the District Court for its consideration.

does not show an unreasonable delay which would warrant a finding that petitioner's constitutional right to a speedy trial had been infringed. Compare, Delano v. Crouse, 327 F.2d 693 (10th Cir. 1964), cert. denied, 377 U.S. 1004.

Even if the record did show an unreasonable delay appellant has made no allegations that he was prejudiced thereby and hence did not state sufficient grounds for relief in habeas corpus. See Townsend v. Burke, 334 U.S. 736 (1948); Dorsey v. Gill, 148 F.2d 857 (D.C. Cir. 1965), cert. denied, 325 U.S. 890.

Appellant's contention that he was held under excessive bail is without merit for the same reason - i.e., failure to allege in what way he was constitutionally prejudiced thereby. Furthermore, in light of the seriousness of the offense charged and appellant's prior record it cannot be said that the bail of $8,150.00 was excessive. The mere fact that appellant may not have been able to pay the bail does not make it excessive. Hodgdon v. United States, 365 F.2d 679 (8th Cir. 1966).

IV.

THE DISTRICT ATTORNEY'S REMARKS CONCERNING APPELLANT'S PRIOR FELONY CONVICTION DOES NOT RAISE A FEDERAL QUESTION.

The charging of a prior felony conviction does not raise a federal question. The record does not support appellant's allegation that the prior conviction was a product of a coerced plea of guilty. In fact, the record amply estab-

lishes that it was not. It is clear from the record that appellant was represented by counsel at all critical stages of the 1946 proceeding and appellant's counsel represented to the court that he was satisfied that there had been no mistreatment. See Exhibit "D",[2/] page 2. The record also contains appellant's confession of guilt which was obtained after informing him that anything he said would be used against him at trial, and that he need not give a statement unless he wanted to. Appellant himself acknowledged in the statement that it was given freely, voluntarily, and of his own free will. See Exhibit "E", pps. 1, 2.

Furthermore, even if appellant's prior conviction was a result of a coerced plea it has no force and effect upon his present incarceration. The maximum sentence for a conviction of manslaughter in 1946 was 10 years. Calif. Stat. 1945, ch. 1006, p. 1943, § 2. The effect of this prior conviction upon appellant's 1962 conviction was to raise the minimum term he had to serve for that offense to two years. Calif. Pen. Code § 3024(c). Therefore, appellee submits that the charging of the prior conviction in this case raises no federal question, Spencer v. Texas, 385 U.S. 554 (1967), at this time and is without force or effect upon appellant's incarceration. Compare, Arketa v. Wilson, 373 F.2d 582 (9th Cir. 1967).

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2. All exhibits refer to those attached to appellee's Return to Order to Show Cause filed below on February 14, 1967.

V.

APPELLANT'S ALLEGATIONS THAT TRIAL COUNSEL RETAINED BY HIM WAS CONSTITUTIONALLY INEFFECTIVE ARE INSUFFICIENT TO WARRANT RELIEF.

Appellant maintains that he was inadequately represented by counsel at the sentencing phase of his trial due to counsel's candor in indicating to the court that he felt appellant should serve some period of imprisonment for the crime.

A review of the record lodged with the District Court and of the opinion of the California Court of Appeal in People v. White, 212 Cal.App.2d 464 (1963), compels a conclusion that appellant received able representation of counsel at trial.

Appellee submits that since the role of counsel at the sentencing proceeding is somewhat different than that at trial, and in light of appellant's prior record his conviction of a serious offense, and California's indeterminate sentence law, it cannot be said that this statement is evidence of constitutionally ineffective representation. Compare Vitoratos v. Maxwell, 351 F.2d 217, 223 (6th Cir. 1965); and Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962). Furthermore, in light of the circumstances enumerated above, even if counsel's statement was improper it was harmless error beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967).

VI.

APPELLANT'S OTHER ARGUMENTS ARE EITHER WHOLLY LACKING IN MERIT OR ARE NOT PROPERLY BEFORE THIS COURT.

Appellant argues in his opening brief that the trial court's instructions to the jury upon lesser included offenses was improper, that the trial court submitted improper verdict forms to the jury, and that he was denied due process because he was tried for a greater offense than that for which the jury convicted him. The latter two of these allegations were not raised in the district court and are therefore not properly before this Court on an appeal from that court's denial of his petition for a writ of habeas corpus. The former allegation of improper instructions has never been presented to the state court and appellee submits that so patently lacking in merit as to require no extended discussion.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the order of the district court denying appellee's petition for writ of habeas corpus should be affirmed.

DATED: February 16, 1968

THOMAS C. LYNCH, Attorney General
of the State of California

DERALD E. GRANBERG
Deputy Attorney General

WILLIAM D. STEIN
Deputy Attorney General

Attorneys for Appellee

WDS:lp
24CRSF
66-710

CERTIFICATE OF COUNSEL

I certify that in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, this brief is in full compliance with these rules.

DATED: February 16, 1968

WILLIAM D. STEIN
Deputy Attorney General